FILE COPY

FILED
FEB 16 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1947.

No. 548

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, *Petitioner,*

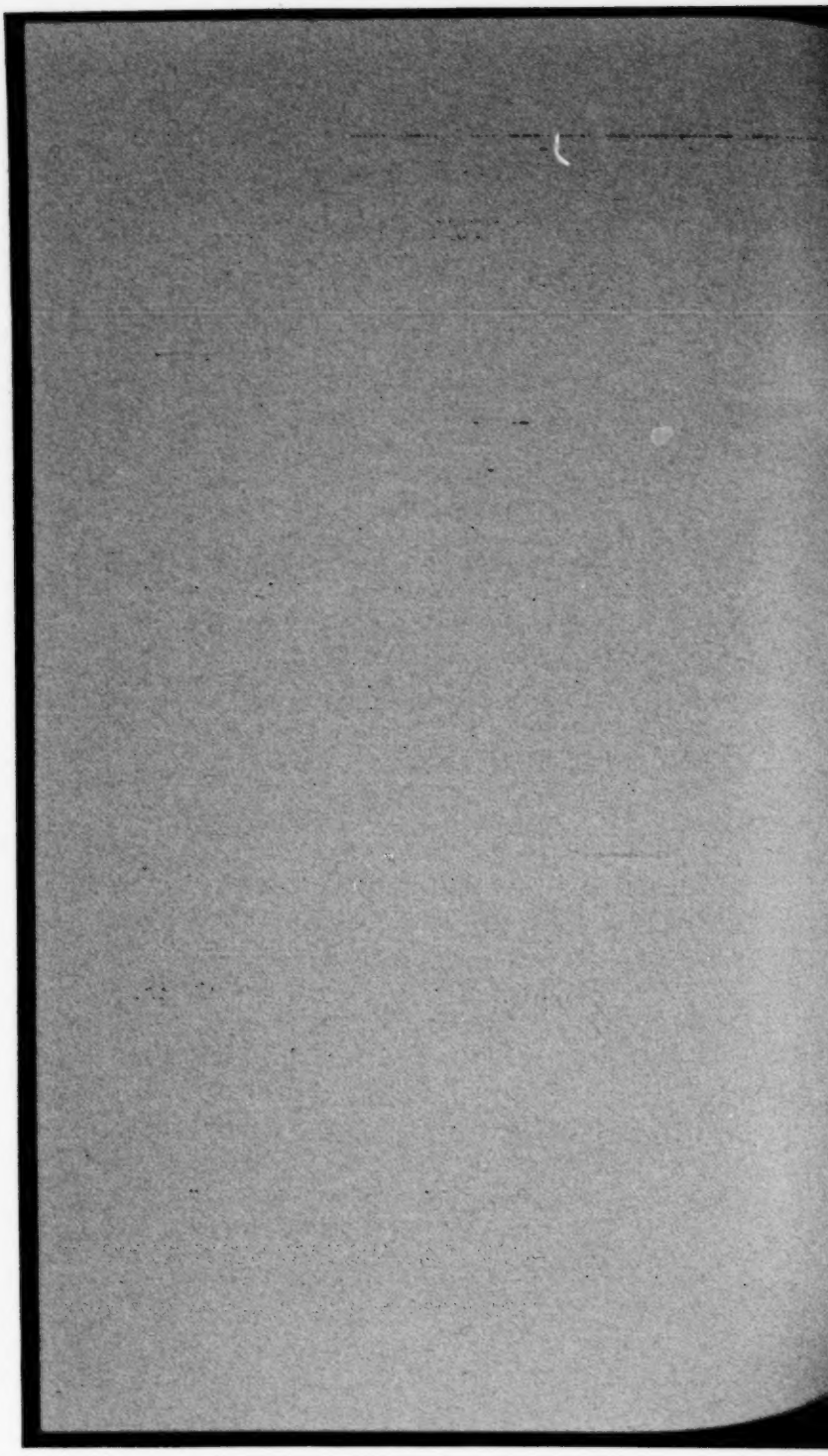
vs.

EVERETT E. HUSTED, *Respondent.*

BRIEF IN OPPOSITION OF RESPONDENT

DAVIS, MICHEL, YARGER & MCGINLEY,
610 Baker Building,
Minneapolis, Minnesota,

WALTER F. MALEY,
906 Savings & Loan Bldg.,
Des Moines, Iowa.
Attorneys for Respondent.



INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
ARGUMENT	6
CONCLUSION	14

CITATIONS

CASES:

Bailey v. Vermont Central Ry. 319 U.S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062	9
Blair v. B & O, 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490	10
Jacob v. City of N. Y., 315 U.S. 752, 86 L. Ed. 1166	9
Jesionowski v. Boston & Main Rd., 91 U.S. L. Ed. 355 (Dec. Jan. 13, 1947)	10
Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916	10
Missouri Pacific v. Aeby, 48 S. Ct. 177, 275 U.S. 426, 72 L. Ed. 351	12
Myers v. Reading Co., 67 S. Ct. 1334 (Dec. June 2, 1947)	10
Owens v. Union Pacific, 319 U.S. 715 87 L. Ed. 1166	10
Tiller v. Atl. Coast Line, 318 U.S. Pg. 54 63 S. Ct. 444, 87 L. Ed. 610	9
Tennant v. Peoria & P.U.R. Co., 321 U.S. Pg. 29, 64 S. Ct. 409	9

STATUTES:

Federal Employer's Liability Act, As Amended, U.S.C.A., Title 45	12
Safety Appliance Act, (Mar. 2, 1893, Ch. 196, Sec. 1, 27 Stat. 531) (Title 45, F.C.A., as amended Aug. 11, 1939, Ch. 685, Sec. 1, 53 Stat.)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1947.

No. .....

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, *Petitioner,*

vs.

EVERETT E. HUSTED, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, Eighth Circut, (R. 134 to 143) is reported in 164. Fed. (2d) pg. 65.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1947. (R. 143-144). No Petition for Rehearing was filed in the Circuit Court. Mandate was issued out of said Circuit Court of Appeals in said cause to the United States District Court for the Southern District of Iowa, on the 14th day of November, A.D., 1947. Said Mandate has never been recalled, superseded or stayed. (R. 145). The jurisdiction of this Court is invoked under

Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is a railway company required under the act involved, to maintain a station platform, upon which trainmen alight from trains in the performance of their duties, in safer condition than for general and ordinary uses such as walking, trucking and other depot purposes?

2. Whether the jury could properly find that the depot platform was the proximate cause of Respondents fall and injury?

3. Were Respondent's injuries the proximate result of actionable negligence on the part of Petitioners and was the Circut Court justified in so ruling as a matter of law?

STATUTE INVOLVED

> Section 1. "Every common carrier by railroad while engaging in commerce between any of the several states * * shall be liable in damages to any person sufering injury while he is employed by such carrier in such commerce * * for such injury * * resulting in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Act of April 22, 1908, 35 Statutes at Large 65, U.S.C.A., Title 45, Secs. 51-58).

By the 1939 Amendment, assumption of risk as a defense was eliminated by Congress.

The 1939 Amendment to the Federal Employer's Liability Act, 45 U.S.C.A. 54, provides that an

> "Employee shall not be held to have assumed the risks of his employment in any case where such

injury or death resulted in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier."

STATEMENT

This is a personal injury action to recover damages under the Federal Employer's Liability Act. Trial to a jury resulted in a verdict for Respondent. Upon appeal, the Eighth Circut Court affirmed. 164 Fed. (2d) 65, (R. 133-143). By complaint, Husted alleged that the railway company maintained certain railway yards, tracks, and a station platform extending into and through the Station of Van Meter, in the State of Iowa (R. 3). He further alleged that it was the duty of the Defendant to use reasonable care to keep the station platform in a reasonably safe condition (R. 3), but that the Defendant failed in its duty in that regard in that it allowed the platform "to be in a defective, dangerous, and uneven condition, and allowed depressions to remain therein, and allowed the same to be, and it was, in such condition as to render it dangerous and unsafe for railway employees obliged to alight from moving cars on said platform". (R. 3).

The complaint further alleged that while Plaintiff was acting within the scope and course of his employment, he attempted to alight from a slowly moving car going about two miles an hour and that because of the negligence of the Appellants in the maintenance of the platform, he sustained severe personal injuries.

Husted alleged that he was injured while engaged in interstate commerce.

The answer admitted interstate commerce (R. 6). It further alleged that the accident was caused solely by Plaintiff's negligence (R. 7). The answer further denied that the platform in question was "in a defective, dangerous or negligent condition" and denied that "defendants allowed

depressions to remain therein" and it "was unsafe for railway employees" (R. 7).

Everett E. Husted, the Appellee, was 51 years of age at the time of the trial. For some 23 years he worked for the Appellant Railway Company (Trustees) as a railway freight brakeman. On June 23, 1943, Husted met with injuries for which this action is brought.

The train in question left the station of East Des Moines that morning, pulling about ten or eleven cars.

Leaving Booneville Husted rode in the head car next to the engine. The next station was Van Meter where the accident occurred. It was Husted's intention to get out at the depot at Van Meter. He had been instructed by his conductor, Burns, "about getting the switch list at Van Meter, and find out what work there was to do in switching and spotting cars and setting out" (R. 13).

As the train was coming into Van Meter, it slowed down to probably about 2 miles an hour. It was a warm day. Husted sat down on the edge of the door of the box car with his hands on the floor of the car and his feet hanging down below the car, that is, at the side of the car (R. 13). He illustrated his position to the jury saying: "I got down like this to get off, with my feet hanging down, and the train was down to about two miles an hour, and there was an awful surge of the train, which threw me out, and I caught my foot in a crack in the curb there, and slipped with my foot and it threw me and I lit on my left shoulder and side on the platform" (R. 13).

He further testified: "I caught my foot in the curbing" (R. 13). He said there was a crack in the curbing, which was about an inch and a half or two inches deep, and that the curb was six or seven inches wide (R. 13).

It might be stated at this point that while Husted testified there was an awful surge or jerk of the train, and

while probably there was sufficient evidence of such surge and jerk of the train to raise a question of fact for the jury as to negligence on this phase of the case, the Appellee, in the interest of caution and safety and desiring to avoid any possible error, requested that the Court submit to the jury but one issue of negligence—that of the defective platform. This was done (R. 76).

The record (Exhibit A-15) details the position of the platform and curbing (See Exhibit B-17). The record does not disclose any markings on the exhibit to indicate just where Husted fell. However, the spot was POINTED OUT TO THE JURY. Husted testified: "I caught my foot in a crack in the curb" (R. 13).

On page 18 of the record the following appears: "Referring to Exhibit 'B' my foot was caught RIGHT HERE in the curbing (indicating a point on Exhibit 'B' where there appears to be a break in the curbing)."

Exhibit B is found on Page 17 of the record. It appears that the curbing at this point had broken away from the main portion of the platform, as is clearly evidenced by the photograph Exhibit B. This was pointed out to the jury as the point of the injury. Husted testified: "My foot was caught right here in the curbing" (R. 18).

Husted testified that before he attempted to alight there was an awful jerk (R. 13). Defendant's conductor testified that he did not remember any lurching or jerking of the train, but upon cross-examination said: "It is not unusual for there to be some jerk in freight trains coming into stations in making a stop" (R. 82).

As to the point of the accident attention is called to Defendants' (Appellants') Exhibit 7 (R. 37). In this picture a man is shown standing opposite one of the large breaks in the curbing, which also appears on Plaintiff's Exhibit B, and which Plaintiff indicated in his testimony

(R. 18) as the place where "my foot was caught right here in the curbing" (R. 18).

On the back of Appellants' Exhibit 7 it is stated that the photograph is a "view to east showing station platform with man standing on track opposite approximate point of accident" (R. 39).

An examination of the Exhibit (R. 37) shows the man standing approximately opposite the break in the curbing, which was indicated by Husted on Exhibit B (R. 18).

To summarize Husted's testimony, it is to this effect: While he was riding in the doorway of a box car coming into Van Meter with the train going about 2 miles an hour and as he was preparing to alight, there was a jerk of the train and he fell from the car, caught his foot in the broken curb and slipped and was injured (R. 13). There was no question about the break in the curb and no question but that it had existed for many years. The accident happened on June 23, 1943. At the time of the trial in March, 1947, the breaks in the curb had not been fixed (R. 90).

ARGUMENT

The questions seem to be (1) was Defendant negligent in the maintenance of the platform in question, and (2) was the negligence of the Defendant "in whole or in part", a proximate cause of Plaintiff's injury.

Since there is no question of assumption of risk in view of the 1939 Amendment to the Employer's Liability Act, and since contributory negligence, if any, may only be considered in litigation of damages, consideration of these latter questions are herein pretermitted.

THE MODERN RULE AS TO THE FUNCTION OF A JURY

The new District Court rules provide:

> "(A) RIGHT PRESERVED, The right of trial by jury as declared by the Seventh Amendment to the Constiution or as given by a statute of the United States shall be preserved to the parties involate."
> (Rule 38. Rules of Civil Procedure for the District Courts of the United States.)

The Supreme Court of the United States has very definitely and clearly returned to the basic and fundamental concept entertained by the founders of our Country, to-wit: that fact questions should be determined by a jury. We quote the language of Mr. Justice Murphy, in speaking for that Court.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."
> Jacob v. City of New York, 62 S. Ct. 854, 315 U.S. 752, 86 L. ed. 1166.

Mr. Justice Murphy did not enunciate for the Supreme Court of the United States any new or startling rule. He merely got back to basic principles. In an early day Mr. Justice Hunt, speaking for the Supreme Court of the United States first spoke of cases where the facts were undisputed and where a court might hold as a matter of law there was no negligence. He also spoke of cases where the facts were undisputed and the Court might be obliged to hold there was negligence, as a matter of law.

Then the Justice spoke of cases in the range between the two extremes before mentioned, using this language—just as appropriate in 1946 as it was in 1874:

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and saner conclusions from admitted facts thus occurring, than can a single judge."

CASES UNDER THE FEDERAL EMPLOYERS' LIABILITY LAW.

On May 24, 1943, the case of *Bailey v. Central Vermont Ry.* 319 U.S. 350, 63 S. Ct. 1062, 87 L. ed. 1444, was decided by the Supreme Court of the United States, the opinion being written by Mr. Justice Douglas. We quote from the opinion:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence." Jacob v. New York City, 315 U.S. 752, 62 S. Ct. 854, 86 L. ed. 1166. IT IS PART AND PARCEL OF THE REMEDY AFFORDED RAILROAD WORKERS UNDER THE EMPLOYERS' LIABILITY ACT. REASONABLE CARE and CAUSE and EFFECT are as elusive here as in other fields. BUT THE JURY HAS BEEN CHOSEN AS THE APPROPRIATE TRIBUNAL TO APPLY THOSE STANDARDS TO THE FACTS OF THESE PERSONAL INJURIES. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude,

> archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. TO DEPRIVE THESE WORKERS OF THE BENEFIT OF A JURY TRIAL IN CLOSE OR DOUBTFUL CASES IS TO TAKE AWAY A GOODLY PORTION OF THE RELIEF WHICH CONGRESS HAS AFFORDED THEM."

The language of this case is particulary significant. This is the only case in which it has been said, so far as the writer of this brief is aware, that the right to trial by jury "IS PART AND PARCEL OF THE REMEDY AFFORDED RAILROAD WORKERS UNDER THE EMPLOYERS' LIABILITY ACT".

And it is to be noted that the Court says that to deprive the workers of a jury trial in doubtful cases would "TAKE AWAY A GOODLY PORTION OF THE RELIEF WHICH CONGRESS HAS AFFORDED THEM".

We will not take the time to quote from the cases, but the Supreme Court of the United States has held that close cases as well as others should be submitted to the jury. The situation may have been different ten years ago, but such is the law today.

THE CLOSE CASES

The rule is definite and clear that IN CLOSE OR DOUBTFUL CASES the issue of negligence should be submitted to a jury.

Jacob v. City of N.Y., 315 U.S. 752, 62 S. Ct. 854, 86 L. ed. 1166

Bailey v. Vermont Central Ry., 319 U.S. 350, 63 S. Ct. 1062, 86 L. ed. 1444

Tiller v. At. Coast Line, 318 U.S. 54, 63 S. Ct. 444, 87 L. ed. 610

Tennant v. P. & P. Union Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. ed. 520

Owens v. U. P., 319 U.S. 715, 63 S. Ct. 1271, 87 L. ed. 1683
Blair v. B. & O., 65 S. Ct. 545, 323 U.S. 600, 89 L. ed. 490
Lavender v. Kurn, 66 S. Ct. 750,
Myers v. Reading Co., 67 S. Ct. 1334 (Dec. June 2, 1947)
Jesionowski v. Boston & Main Rd., 91 U.S. L. ed. 355 (Dec. Jan. 13, 1947).

If a jury issue existed in such cases as those above cited, particularly the Lavender v. Kurn case, there is no question but that a jury issue exists in the case at bar.

NO ASSUMPTION OF RISK

While the statute has done away with the defense of assumption of risk, railway companies have kept continually pecking away at the statute and have been trying to weaken and "lessen the significance of plain words". The Supreme Court of the United States has definitely spoken in this matter. It has said that such cases are for the jury.

In the often-quoted cases of Tiller v. Atlantic Coast Line, 63 S. Ct. 444, 318 U.S. 54, 87 L. ed. 610, Mr. Justice Black wrote the opinion, in which he quoted from the older case of Jones v. East Tennessee, etc. R. Co., 128 U.S. 443, 9 S. Ct. 118, 72 L. ed. 478.

Mr. Justice Black said:

> "No case is to be withheld from a jury on any theory of assumption of risk and QUESTIONS OF NEGLIGENCE SHOULD UNDER PROPER CHARGE FROM THE COURT BE SUBMITTED TO THE JURY FOR THEIR DETERMINATION. Many years ago this court said of the problems of negligence, "WE SEE NO REASON, SO LONG AS THE JURY SYSTEM IS THE LAW OF THE LAND, AND THE JURY IS MADE THE TRIBUNAL TO DECIDE DISPUTED QUESTIONS OF FACT, WHY IT SHOULD NOT DECIDE SUCH QUESTIONS AS THESE AS WELL AS OTHERS'. Jones v. East Tennessee, etc. R. Co. 128 U.S. 443, 445, 9 S. Ct. 118,

32 L. Ed. 478. Or as we have put it on another occasion: 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, 'the cases should go to the jury."

Citation of cases involving similar facts cannot be of particular aid to the court. But the very early case of Bennett v. Louisville and Nashville R.R.Co. 12 Otto 577, 26 L. ed. 235, is interesting. It appeared that plaintiff's decedent stepped into a hole in the floor of a depot platform. The court held that a question was presented for a jury as to the negligence of the Company. To be true, this was a DEEPER hole and a more extreme case than the case at bar. The rule of law, however, is the same whether the depression be an eighth of an inch or eight feet. The Supreme Court in this early case held the question of negligence to be for the jury.

The basic question was: Did the defendant exercise reasonable care in the premises? Whether such reasonable care was exercised was a jury question under this early case and is a jury question under the recent cases.

In the case of Texas & P. R. Co. v. Stewart, 228 U.S. 357, 57 L. ed. 875, it appeared that a lady got upon a wrong train; that when she discovered this fact, she attempted to alight; that the illumination was deficient and she was injured.

The Court said that a railroad company was bound to use ordinary care to light its stations and approaches. By the same token a railway company is bound to use ordinary care to keep its platform in a reasonably safe condition and whether or not the condition in which it existed constituted ordinary care is a question for the jury.

FEDERAL STATUTE APPLIES TO DEPOT PLATFORM

> "The act makes the carrier liable for injuries resulting to its employes by reason of any defect or insufficiency due to its negligence in 'its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment'. The language is broad and includes things and places furnished by the carriers to be used by their employees in the performance of their work. The platform was intended to be and was used by respondent to do station work. Having regard to the beneficient purposes of the act, it would be unreasonable to hold that, when so used, a station platform is not covered by the word 'works' in the above-quoted provision. The Supreme Court rightly held that the clause applied."
>
> Missouri Pac. R. Co. v. Aeby, 48 S. Ct. 177, 275 U.S. 426, 72 L. ed. 351.

While the above case was reversed on another point, the above quotation is clearly pertinent in the above case.

The court further said:

> "This case is governed by the act and the applicable principles of common law as established and applied in federal courts. There is no liability in the absence of negligence on the part of the carrier. Seaboard Air Line v. Horton, 233 U.S. 492, 501, 34 S. Ct. 635, 58 L. ed. 1062, L.R.A. 1915 C, 1 Ann. cas. 1918B, 475, New York Central R. R. Co. v. Winfield, 244 U.S. 147, 150, 37 S. Ct. 546, 61 L. ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139. Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be reasonably safe. The measure of duty in such cases is reasonable care, having regard to the circumstances."

Again the court in this case said:

> "The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, famiilar with the situation, are deemed voluntarily to take the risk of known conditions and dangers."

Relative to the last above quoted statement as to the difference between the duties to passengers and employees, the rule is now changed.

In view of the 1939 Amendment to the Act doing away with assumption of risk "the reasons" for the difference between the duty to passengers and employees no longer exists.

In fact under the statute the carrier is liable to an employee, if its negligence "IN WHOLE OR IN PART" is a proximate cause of the injury.

PROXIMATE CAUSE

It is to be noted that under the Federal Statute the negligent act of the carrier need not be the sole proximate cause of the injury. It is sufficient if be A proximate cause.

> *Davis v. Wolfe,* 263 U.S. 239, 68 L. ed. 285 44 S. Ct. 64.

All that is required is the setting of probative facts "capable of supporting, with reason, the conclusion expressed in the verdict."

> *Myers v. Reading Company,* 67 S. Ct. 1334 (Dec. Jan. 13, 1947).

A further expression from the same opinion has application here.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In passing it might be said that the facts in both *Myers v. Reading Company* and *Lavender v. Kurn,* were not as

favorable to the injured employee as those evidenced by the record in favor of Respondent.

Missouri Pacific v. Aeby, 48 S. Ct. 177, 275 US. 426, 72 L. ed. 351, specifically held that a depot platform would come within the definition of the word "works" as used in the Federal Employer's Liability Act.

CONCLUSION

It is apparent that the decision of the Eighth Circuit is not in conflict with the applicable decisions of this Court and contrary to the decisions of this Court. Nor is the decision in conflict with the decisions of other Circuits in holding that jury issues as to negligence and proximate cause are presented by the record in this case.

There is nothing new, novel or unusual about the case, except the moderate size of the verdict returned. It is suggested that in the light of the record here made, the well established and controlling rules of law which prevail, coupled with the fact that the mandate has issued, and may rightfully be enforced at any time, rendering the questions raised moot and abstract, that the petition for the writ should be denied.

Respectfully submitted,

TOM DAVIS,
CARL YAEGER,
C. S. MCGINLEY,
610 Baker Bldg.
Minneapolis, Minnesota,

WALTER F. MALEY,
906 Savings & Loan Bldg.,
Des Moines, Iowa,
Attorneys for Respondent.